State Privacy and Security Coalition, Inc

November 8, 2010

Senate Judiciary Committee Chairman Wayne Kuipers and Members of the Judiciary Committee
P.O Box 30036
Lansing, Michigan 48909-7536

Re: Opposition to Substitute Senate Bill 1556 - Right of Publicity

Dear Senator Kuipers and Members of the Senate Judiciary Committee:

As a coalition of leading technology companies and technology trade associations, we write to express our strong opposition to the SB 1556 substitute as currently drafted and to be introduced in the Senate Judiciary Committee on Tuesday, November 9, 2010 ("Substitute"). We are not opposed in principle to state right of publicity bills, but, SB 1556 suffers from three serious problems that leave us no choice but to oppose the bill:

(1) The Substitute would suppress a very wide range of First Amendment-protected expression that refers to a celebrity's name or other attribute for a constitutionally protected commercial purpose;

(2) The Substitute would impose strict liability without any requirement that any owner of a right of publicity (even a partial owner) register their rights in advance, making it extremely difficult for companies to know from whom to clear rights to use a name or attribute; and

(3) The Substitute would invite personalities across the country to sue in Michigan, even if they had little or no connection to the State, uniquely disadvantaging to businesses in this State.

First, by eliminating the advertising and creative exceptions in previous versions of the bill, the Substitute would give any whole or partial owner of a right of publicity *carte blanche* to suppress First Amendment protected speech. For example, comparative advertising that provides users with information comparing a product bearing the name of a personality with a competing product (for example, explaining that the George Foreman grill is more expensive than a Charbroil grill) could be stifled. Similarly, nominative, incidental uses of a personality's name or others attributes to accurately describe a product or service – for example, the lawful resale of lawfully acquired memorabilia about an actor, athlete or musician on the Internet – could be suppressed. In addition, the development or sale of creative works (such as movies, plays, and video games) that use names or other attributes of personalities could be suppressed. Importantly, personalities

could wield these rights to suppress works of parody or criticism, arguing that they were not "broadcasting or reporting."

Second, the bill would create broad rights that would be extremely difficult for well-intentioned companies who respect rights of publicity to comply with. It would create strict liability without fair notice to potential defendants and without any requirement to register those rights in Michigan prior to suing (previous versions of the bill did require registration). Worse yet, it would make these sweeping rights freely transferable and divisible. This would allow multiple heirs or even each of a large numbers of "investors" in portions of a right of publicity to bring separate lawsuits to enforce the same right. It would also make it extraordinarily difficult for Internet companies to tell whether a person requesting removal of content for violating the statute in fact has the right to make that request or is instead advancing a bogus request to censor content. Such a system would be far too complex and broad to be workable.

The Substitute also places an unreasonable requirement on all licensees to conduct due diligence to determine who the licensor's heirs are to obtain permission from all of them to continue to exercise the rights already licensed to the licensee. This requirement will require a substantial expenditure in time and resources to determine who the heirs are and obtain permission from those individuals when the rights have already been granted to the licensee.

Finally, the Substitute would invite personalities across the country to sue in Michigan, even if they had little or no connection to the State, uniquely disadvantaging businesses in this State. The threat of strict liability created by the Substitute is a powerful tool that could be used by any owner of a whole or partial interest in a right of publicity anywhere in the country. The result would be to expose Michigan businesses to threats and lawsuits from right of publicity owners and part-owners located anywhere in the U.S. This sort of uncertainty and insurance risk would chill advertising and creative activity by businesses in Michigan during a very difficult economic time.

For all these reasons, we hope that if you move forward with SB 1556, you will restore the provisions in Representative Byrnes' bill on the same subject that addressed these concerns.

Thank you in advance for considering our concerns.

AOL
Entertainment Software Association
Google
State Privacy & Security Coalition
Technology Association of America